Bledsoe v Center for Human Reproduction
2022 NY Slip Op 33855(U)
November 10, 2022
Supreme Court, New York County
Docket Number: Index No. 800212/2011
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

----------X

DANA BLEDSOE and NICHOLAS MCKEE,

Plaintiffs,

- v -

CENTER FOR HUMAN REPRODUCTION, AMERICAN FERTILITY OF NEW YORK, P.C., KUTLUK HAN OKTAY, M.D., HELEN SHI ZHONG, and JAIME LEE,

Defendants.

----------X

INDEX NO. 800212/2011

MOTION DATE 08/05/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 71, 73, 76, 78, 80, 82, 100, 101, 103, 105, and 106

were read on this motion to/for SUMMARY JUDGMENT.

I. INTRODUCTION

In this action to recover damages, inter alia, for negligence, medical malpractice based on departures from good and accepted medical practice, and lack of informed consent, the defendant Kutluk Han Oktay, M.D., moves pursuant to CPLR 2004 to deem his notice of motion for summary judgment and supporting papers to have been timely served and filed, nunc pro tunc, and thereupon pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against him. The plaintiffs oppose the motion. The motion is granted, the summary judgment motion is deemed to have been timely served and filed, and Oktay is awarded summary judgment dismissing the complaint insofar as asserted against him.

II. TIMING OF SUMMARY JUDGMENT MOTION

On March 14, 2019, the plaintiffs filed a note of issue and certificate of readiness, despite the fact that discovery had not yet been completed. Although this note of issue was not immediately vacated at that juncture, the court (Madden, J.), by order dated August 22, 2019, nonetheless directed the plaintiffs to file a note of issue on or before August 30, 2019, and the

parties were given 90 days from the filing of that note of issue within which to move for summary judgment. The Clerk's minutes do not reflect that the plaintiffs in fact filed another note of issue between August 22, 2019 and January 9, 2020, when the court issued an order, which was ultimately entered on February 3, 2020, vacating the note of issue, and extending the deadline for the service and filing of summary judgment motions until March 30, 2020. Indeed, the Clerk's minutes reflect that, after the March 14, 2019 note of issue was vacated, the plaintiffs never filed a new note of issue at any time after January 9, 2020.

The parties thereafter entered into a stipulation, dated March 4, 2020, and so-ordered by Justice Madden on or about March 12, 2020, that further extended the expert witness disclosure deadlines until March 11, 2020 for the plaintiff and April 13, 2020 for the defendants, respectively, and the deadline for filing summary judgment motions until April 30, 2020.

On March 17, 2020, however, the courts were closed due to the COVID-19 pandemic. All filings in both electronically and non-electronically filed matters were suspended until May 5, 2020, and filings in non-electronically filed matters were further suspended until June 10, 2020, when the courts were re-opened for court employees only. The March 12, 2020 stipulation was not filed between March 12, 2020 and June 10, 2020, and counsel for the parties did not receive a copy of the stipulation for several months thereafter. Moreover, during this time period, the plaintiffs' counsel could not file a new note of issue, not because, as Oktay suggested, the March 14, 2019 note of issue remained unvacated, but because the courts were closed and the plaintiffs could not file any papers in this matter, which was then not an electronically filed case.

To resolve the confusion arising from the closure of the courts and the deadlines set forth in prior orders, all parties entered into a proposed stipulation providing, inter alia, that the note of issue would be deemed filed as of November 2, 2020, and that motions for summary judgment would be filed by December 15, 2020. Although this proposed stipulation was submitted to Justice Madden to be so ordered, it was never signed. A second proposed stipulation executed by all parties, this one dated December 10, 2020, was submitted to Justice

Madden for signature. The new proposed stipulation provided that the note of issue would be deemed filed as of December 2, 2020, and that motions for summary judgment would be filed by January 15, 2021. Justice Madden did not sign this stipulation either. On December 23, 2020, counsel for Oktay contacted the court, and explained the situation to Justice Madden's law secretary, who confirmed that neither stipulation had been signed, and promised that she would leave the later of the two proposed stipulations on the Justice's desk with a note. Justice Madden's law secretary suggested that if the stipulation were not signed prior to the date on which Justice Madden retired from the bench, the defendants should consider moving to deem their summary judgment motions timely, nunc pro tunc. On December 30, 2020, Justice Madden retired from the bench, without having signed either stipulation.

In the first instance, the court notes that, as far as it can tell, the March 14, 2019 note of issue was, in fact, vacated by the January 9, 2020 order, as there was no other note of issue recorded in the Clerk's minutes as having been filed between March 14, 2019 and January 9, 2020 to which the January 9, 2020 order might refer. To the extent that there was no valid note of issue on file with the Clerk as of January 28, 2021, when Oktay made his summary judgment motion (*see* CPLR 2211), or as of February 15, 2021, when his motion papers were filed, Oktay has not missed any deadline for the service and filing of summary judgment motion papers. Hence, that branch of Oktay's motion seeking to deem his summary judgment motion as having been timely made is granted, without the necessity of deeming it timely nunc pro tunc.

In light of the confusion engendered by the closing of the courts during 2020, as well as Justice Madden's incipient retirement during the last months of that year, a time during which the parties sought her approval of several proposed stipulations, this court, on its own motion, reinstates the March 14, 2019 note of issue and deems it to have been newly filed, nunc pro tunc, as of December 2, 2020.

III. FACTUAL BACKGROUND

The crux of the plaintiffs' claims is that, on August 8, 2008, the plaintiff Dana Bledsoe, who had recently been diagnosed with breast cancer, and was about to undergo chemotherapy to treat it, presented to the defendant Center For Human Reproduction (CFHR) for a procedure in which her eggs would be retrieved from her ovaries and fertilized with the sperm of her husband, the plaintiff Nicholas McKee. The plaintiffs' plan was that the resulting embryos were to be frozen and stored until Bledsoe was ready to have an embryo implanted, most likely into the uterus of another woman, commonly known as a "gestational carrier." The plaintiffs asserted that the defendants departed from good and accepted medical practice in the manner in which they retrieved and fertilized the eggs, and prepared, froze, and stored the embryos, resulting in damage to or destruction of the embryos, and the concomitant inability to impregnate a gestational carrier with any of the embryos. The plaintiffs claim that Oktay misrepresented the quality of the embryos that resulted from CFHR's fertilization procedure, while virtually guaranteeing them both that an embryo would be successfully implanted and that a child would be born from the embryo.

Bledsoe and McKee were married in 2004. In or about late 2004 or early 2005, Bledsoe had miscarried three weeks into her gestation period. Bledsoe and McKee had a son together in 2006, without any complications during the pregnancy or delivery. In early 2008, Bledsoe had another miscarriage, this time at four to five weeks gestation, which required a dilatation and curettage procedure to remove the nonviable embryo. On April 8, 2008, when Bledsoe was 40 years old, she was diagnosed with breast cancer, specifically ductal carcinoma, stage IB, with aggressive estrogen-positive malignancy. The plaintiffs had discussed having additional children prior to Bledsoe's diagnosis, and her obstetrician, Jacques Moritz, M.D., was made aware of the plaintiffs' desire in this regard. Following Bledsoe's cancer diagnosis, Dr. Moritz recommended that she bank embryos prior to her chemotherapy because the cancer treatment likely would render her unable to produce eggs, also known as oocytes. Dr. Moritz referred

Bledsoe to oncologist Alexander J. Swistel, M.D., for further cancer treatment and to Oktay for fertility preservation. Dr. Swistel advised Bledsoe that she would have to undergo lumpectomies before proceeding with fertility preservation, and then with chemotherapy thereafter. Bledsoe underwent the lumpectomies in mid-2008, and planned to commence chemotherapy with Bonnie Reichman, M.D., shortly after completing egg retrieval, fertilization, and cryopreservation.

Bledsoe first presented to CFHR on July 11, 2008, at which time the medical staff there took a medical history and performed a physical examination, including a pelvic exam and ultrasound scan. Oktay conducted a fertility preservation consultation with Bledsoe, and found her to be a candidate for fertility preservation in accordance with an Assisted Reproductive Technology-In Vitro Fertilization Cycle (IVF) approach, which would permit her to have the opportunity to employ autologous genetic material, that is, her own eggs, and thereafter have a liveborn child either by carrying it herself or employing another woman as a gestational carrier. Oktay met with Bledsoe for 50 minutes, and discussed with Bledsoe how chemotherapy could "irreversibly damage her egg reserve and that given her age . . . she would have a very, very high chance of losing her fertility," and asserted that, for a woman with estrogen-sensitive cancer, the best chance for her to have children would be the stimulation of her ovaries, retrieval of her eggs, fertilization of her eggs with her husband's sperm to generate embryos, and embryotic freezing, also known as cryopreservation. According to Oktay, he advised Bledsoe that, even with embryo preservation, her success rate would be limited given her age and past reproductive history of multiple miscarriages. According to the plaintiffs, Oktay virtually guaranteed them that the embryos would yield the birth of a child.

In the consent form that the plaintiffs signed, the IVF procedure was described, and they agreed that

> "[w]e have been advised that IVF does neither guarantee the establishment of pregnancy, nor, in case a pregnancy is established, the establishment of a normal pregnancy. Indeed, recent investigations suggest that the prevalence

> of congenital abnormalities in offspring, after IVF, may be increased. Moreover, pregnancies after IVF experience a higher complication rate than spontaneously conceived pregnancies in practically all parameters. The chance of establishing pregnancy through IVF varies greatly, based on female age and many other clinical parameters. By signing this consent, we confirm that our expected chances have been discussed with us in detail and that all of our questions, in regards. . . to our pregnancy chances with IVF, have been fully, and to our satisfaction, answered. We have also been informed that the practice of medicine in the field of IVF is not an exact science and that no guarantees, whatsoever, can be, therefore, made as to the outcome of the procedure. Sometimes complex, and still unknown factors, may limit outcome chances after IVF."

They were further expressly informed, in the consent form, that "[t]he oocytes (eggs) obtained may not be mature, or too mature, resulting in no viable oocytes," "[f]ertilization of oocytes may not take place at all, or occur In abnormal fashion, resulting in no embryos being available for embryo transfer," "[o]nce fertilized, the subsequent embryo development may be abnormal, resulting in no embryo for embryo transfer," "[e]mbryo transfer into the uterus may be more difficult than expected, or turn out to be outright impossible," and "[e]mbryos, successfully transferred into the uterus, will in a majority of cases, *not* implant and *not* lead to pregnancy" (emphasis in original). The plaintiffs were also informed that "[p]sychological stress may result in anxiety and disappointments," as well as that "[e]very IVF cycle is subject to equipment failure, human errors and other unforeseen circumstances which may result in loss, or damage, of sperm, oocytes (eggs) and/or embryos."

Oktay prescribed Bledsoe follicle stimulating hormone (FSH) to induce ovulation, and Bledsoe agreed to proceed with a letrozole protocol study, which involved a hormone-based chemotherapy regimen. This protocol was initiated on July 30, 2008. Thereafter, CFHR monitored Bledsoe via bloodwork and ultrasound scans that were overseen by Oktay. On August 8, 2008, with ultrasound guidance, a needle was placed through Bledsoe's vaginal wall and into her ovaries to retrieve follicular fluid containing the oocytes. The fluid was collected into test tubes, then passed along to an embryologist, a non-physician who manages the in-vitro processes involving egg, sperm, and embryos, as well as the necessary procedures for

fertilization and cryopreservation. The retrieval process yielded 14 oocytes. CFHR's embryologist, the defendant Helen Shi Zhong, fertilized Bledsoe's eggs with McKee's sperm. Oktay directed the embryologist to freeze the embryos on day three after fertilization, and the embryologist complied with that directive, using cryopreservation materials obtained from the company Cooper Surgical/Life Global. Oktay graded all of Bledsoe's nine resulting embryos as either a level three or four out of five, with five representing the highest quality embryo, on a scale that measured fragmentation and took account of the number of cells into which the embryo had divided, up until the time of freezing, with a higher cell count representing a higher likelihood of viability. Nine embryos were cryopreserved, and stored in six separate straws, some of which obviously contained more than one embryo.

Bledsoe did not undergo a second round of egg retrieval because, according to the plaintiffs, Oktay assured them that one round of retrieval that yielded 14 eggs was sufficient, and he was concerned that the delay occasioned by an additional retrieval procedure would present a risk to her cancer treatment. According to Oktay, he did not make those representations, and that it was solely within the province of Bledsoe's oncologist to determine whether a two-week or longer delay in the commencement of chemotherapy to accommodate additional egg retrieval presented an unacceptable risk in connection with her cancer treatment.

In late 2009, but prior to electing a final medical facility at which the embryos would be thawed and implanted, the plaintiffs, apparently on Oktay's recommendation, consulted with obstetrician/gynecologist and reproductive sciences specialist Aydin Arici, M.D., at the Yale Medicine Fertility Center (Yale) in New Haven, Connecticut. According to the plaintiffs, Dr. Arici told them that he had reviewed their paperwork, but that he did not understand the embryo grading system that CFHR had employed to assess the frozen embryos, inasmuch as it was not a common system. As the plaintiffs recounted it, Dr. Arici told them that he needed to speak with Oktay to understand Oktay's notations and grading system because grading was not commonly done in that manner. The plaintiffs asserted that Dr. Arici called and spoke with

Oktay on the phone while they were in Dr. Arici's office and that, after the telephone conversation, Dr. Arici told them that, given Oktay's grading system, the manner in which the embryos were frozen, and the associated documentation, he concluded that the plaintiffs did not have excellent quality embryos.

After the plaintiffs secured a woman as a gestational carrier, and after their meeting with Dr. Arici, they contacted CFHR about transporting their cryopreserved embryos to Yale, and were told they could either have the embryos sent by FedEx or they could transport the embryos themselves using a Xytex container and driving the embryos to the location. They were further informed that CFHR's patients almost always elected to employ the Xytex container for the shipment of embryos, and that as long as the container, called a "dry shipper," was fully charged with liquid nitrogen, the actual transport of the embryos should not result in any damage. The plaintiffs opted to transfer the embryos themselves in the Xytex container. After obtaining a Xytex shipping container, CFHR transferred the embryos to the container. McKee picked up the container on November 12, 2010, and drove directly to Yale, where the embryos were received at 12:10 p.m. on November 12, 2010 by an embryologist named Marilou, who signed for them. The plaintiffs' embryos were contained in six straws, of which three were unmarked, indicating the straw should have contained two embryos, and three were labeled "1 x 1," meaning the straw should have contained one embryo. After delivery, the embryos remained frozen and stored at Yale. An embryo transfer employing a woman selected by the plaintiffs as a gestational carrier was scheduled for early December 2010 at Yale with Dr. Arici.

According to the plaintiffs, during late November 2010 and early December 2010, Yale called and told them that none of their paperwork matched the straws in their container, and that Yale personnel did not know what was actually in their possession because the straws were not marked properly. On December 5, 2010, Yale thawed three straws, two straws with no marking and one straw labeled "1 x 1," while the remaining three straws were returned to the storage tank. According to the plaintiffs, Dr. Arici told them that, upon thawing the straw that was

supposed to contain one embryo, he observed that the straw was empty. One of the straws that should have contained two embryos was thawed, and, according to the plaintiffs, only one embryo was recovered, and, by the next day, that embryo had degenerated in any event. The other straw that was anticipated to contain two embryos was then thawed, and two embryos were in fact recovered. An assessment conducted on December 6, 2010 indicated that these two embryos consisted of one eight-cell embryo and one three-cell embryo. The plaintiffs contended that the three-cell embryo, which should have been of "fair" quality, was in fact of "poor" quality, and that the eight-cell embryo was of "fair" to "poor" quality, as it was already dark and beginning to degenerate. As the plaintiffs recounted it, Dr. Arici told them that he had never seen anything like that in his medical career, had never seen a straw completely empty, and had never seen an embryo completely degenerated. The Yale embryologist, according to the plaintiffs, later told them that, when an embryo is thawed it did not just disappear, concluding that the freezing process was not performed properly. Like Dr. Arici, she told them that she had never seen that occur where there were no markings. As the plaintiffs explained it, the embryologist also asserted that the paperwork did not match the contents of the container.

Inasmuch as the gestational carrier was medically prepared for an embryo transfer as of December 6, 2010, Dr. Arici suggested to the plaintiffs that he thaw the next straw and see what happened, and the plaintiffs agreed. On December 6, 2010, the plaintiffs received a call from Yale's embryologist, and were told that a fourth straw had been thawed and the embryo was completely atretic, or dead. The team at Yale was unable to discern the original cell count in the thawed embryo. Yale then thawed a fifth straw, which contained an eight-cell embryo that survived fully intact, at which point the plaintiffs were informed that they could transfer the eight-cell embryos from both the third and fifth straws for implantation. That same date, the one straw that remained unthawed was placed back in storage at Yale.

Dr. Arici and the plaintiffs determined to transfer the two eight-cell embryos on December 7, 2010, but, according to the plaintiffs, Dr. Arici told them that he was not hopeful

that the procedure would be successful. By December 7, 2010, the eight-cell embryo that had been thawed on December 6, 2010 had grown to a nine-cell embryo and was graded as a two on a five-point scale, while the other embryo that had been thawed on December 6, 2010 had degenerated. As of December 7, 2010, the eight-cell embryo that had been thawed on December 5, 2010 remained an eight-cell embryo, while the three-cell embryo that had been thawed at the same time remained the same size as well. At that juncture, Yale disposed of the degenerated embryo from the second straw, which had been thawed on December 5, 2010, the three-cell embryo from the third straw, which also had been thawed on December 5, 2020, and the degenerated embryo from the fifth straw, which had been thawed on December 6, 2020.

On December 7, 2010, Dr. Arici transferred, into the uterus of the plaintiffs' gestational carrier, both the arrested eight-cell embryo from the third straw, which had been thawed on December 5, 2010, and the nine-cell embryo from the fifth straw, which had been thawed on December 6, 2010. After a period of two weeks, Yale informed the plaintiffs that the transfer did not result in a successful pregnancy.

The plaintiff thereafter determined to proceed with the thawing of the remaining straw. Inasmuch as the plaintiffs' gestational carrier had to undergo another round of medications in preparation for the embryo transfer, they waited until February 3, 2011 to thaw the sixth straw, which yielded two embryos, one of which an eight-cell embryo that was graded as a level two, and the other of which was a six-cell embryo with the same grade. Medical records reflected that Dr. Arici spoke to Bledsoe at 11:30 a.m. on that date to discuss the quality of these embryos, and indicated that, by February 4, 2011, the embryos had manifested a small amount of viability, growing to nine-cell and seven-cell embryos, respectively. These two embryos were transferred to the plaintiffs' gestational carrier on February 4, 2011, but a February 16, 2011 pregnancy test of the carrier was negative.

After their unsuccessful attempts at pregnancy with their own embryos, the plaintiffs achieved a pregnancy with an egg donor and their gestational carrier in August 2011, with the gestational carrier delivering twins on April 7, 2012.

IV. THE PLAINTIFFS' ALLEGATIONS

The plaintiffs commenced this action on June 24, 2011. In their complaint, they alleged that, on August 8, 2008, Bledsoe underwent egg retrieval and that she and McKee subjected her eggs and his sperm to in vitro fertilization with intracytoplasmic sperm injection at the defendants' office, resulting in the generation of 10 embryos. They asserted that, from August 8, 2008 until August 11, 2008, the defendants observed the growth and development of the embryos and that, on August 11, 2008, the defendants informed the plaintiffs that 9 of the 10 embryos had grown and developed, and were of such a quality that they could be frozen. The plaintiffs further averred that, on August 11, 2008, the defendants froze the nine embryos through cryopreservation according to their protocol and that these then were stored by the defendants, continuously remaining in their sole custody and control until transferred to Yale in November 2010. With respect to Oktay, the plaintiffs asserted in their complaint that he informed them of these positive results, and that another round of fertility treatments, egg retrieval, and in vitro fertilization with intracytoplasmic sperm injection was not necessary because of the "fine quality of the aforementioned nine embryos," while also advising Bledsoe that she could begin her treatment for breast cancer.

The plaintiffs asserted that, ultimately, due to the negligence of all of the defendants in the extraction and fertilization of Bledsoe's eggs, and the marking, grading, handling, freezing, storage, and provision of the embryos to the plaintiffs for re-transfer to Yale, the embryos became damaged, destroyed, or unusable, thus resulting in the inability of their gestational carrier to become pregnant upon implantation of the embryos. They further alleged that Oktay departed from good and accepted practice by recommending Bledsoe to forego an additional

round of egg retrieval and fertilization, thus preventing her, subsequent to her regimen of chemotherapy, from ever recovering any of her own eggs for in vitro fertilization.

In their amended bill of particulars directed to Oktay, the plaintiffs averred that Oktay departed from good and accepted medical practice by failing to provide proper gynecological and in vitro fertilization care, inasmuch as he failed properly to grow, select, grade, label, store, freeze, cryopreserve, monitor, prepare for transfer, and transfer the plaintiffs' embryos. They asserted that Oktay failed properly to create fertilized embryos and prepare Bledsoe for egg retrieval, negligently performed and supervised the egg retrieval process, and improperly evaluated the retrieved eggs. In addition, they alleged that Oktay negligently failed to prepare the plaintiffs for intracytoplasmic sperm injection, failed to supervise and perform intracytoplasmic sperm injection, and negligently performed that procedure.

The plaintiffs further faulted Oktay for the manner in which he observed and monitored the growth and development of the embryos prior to freezing, charted that growth and development, and evaluated that development. In this regard, they alleged that Oktay negligently failed properly to select and prepare the plaintiffs' embryos for cryopreservation, properly grade the embryos, or employ the proper criteria for the selection of embryos to be frozen. The plaintiffs further asserted in their amended bill of particulars that Oktay failed properly to label the embryos, failed properly to monitor the freezing and storage so as to preserve the embryos, and failed properly to store them in appropriately marked straws for later thawing. They also alleged that Oktay negligently directed that the embryos be frozen on day three after fertilization, rather than waiting two more days to assure that they were properly developed prior to freezing.

In addition, the plaintiffs asserted in their amended bill of particulars that Oktay departed from good and accepted practice by informing Bledsoe that she could proceed with cancer care and treatment after one egg retrieval and embryo fertilization session, and in informing the plaintiffs that they would have a successful pregnancy employing he embryos created from their

IVF cycle. They also averred that Oktay was negligent in failing to perform a repeat IVF cycle to increase the number of embryos available to plaintiffs for implantation and properly to counsel the plaintiffs in this regard, as well as in misrepresenting the actual quality of the embryos that had been generated.

Moreover, the plaintiffs contended that Oktay departed from good medical practice in the manner in which he communicated with CFHR's embryologists to handle the embryos and in failing adequately to provide the plaintiff with an explanation concerning the quality of their embryos. They also faulted Oktay for instructing the embryologist to freeze all of the plaintiffs' embryos without considering their grading, maturation, quality, and the number of cells that had developed prior to freezing, and in failing to communicate with the embryology staff regarding such quality, grading, maturation, and number of cells.

In their amended bill of particulars, the plaintiffs further asserted that Oktay negligently supervised and trained embryologist defendants Jiangmin Li and Zhong, and that he damaged the embryos in the course of their handling. In addition, the plaintiffs contended that Oktay failed properly to prepare the embryos for storage and thereafter failed properly to store them, did not properly prepare the embryos for transfer to a shipping container in preparation for transport, and did not properly transfer them. They further asserted that he did not timely and properly suggest that they employ a professional transport company for transport of their embryos or inform them that their embryos could be damaged in their transport. They further faulted Oktay for failing timely to provide Yale with the proper thaw protocol for the embryos.

As a consequence of Oktay's negligence, the plaintiffs asserted in their amended bill of particulars that they sustained the disintegration, spoilation, destruction, deterioration, damage to, and loss of embryos, as well the loss of the opportunity and ability to implant frozen embryos. They asserted that Bledsoe consequently would need future gynecologic care that she otherwise would not have needed, including hormone therapy, as well as future infertility treatment and care and the need for lifetime psychological counseling. The plaintiffs further

asserted that Bledsoe lost the ability to harvest additional eggs, with the concomitant loss of ability to create additional embryos using those eggs and the ability to have further children using their own embryos. Additionally, they claimed to have suffered emotional distress and loss of enjoyment of life.

They further asserted that Oktay failed to apprise them of all of the risks associated with the IVF process, including the possibility that the procedure would fail because embryos might be damaged or destroyed shortly after fertilization or during the storage process.

V. THE SUMMARY JUDGMENT MOTION

In support of his summary judgment motion, Oktay submitted the pleadings, the plaintiff's bills of particulars directed to him, relevant medical records, and the deposition transcripts of all of the parties, as well as the expert affirmation of Joseph F. Sanfilippo, M.D., a board certified obstetrician/gynecologist, with a board-certified subspecialty in reproductive endocrinology, who has practiced in the fields of reproductive endocrinology and infertility for more than 40 years. He concluded that Oktay did not depart from good and accepted medical practice either in the manner in which he extracted Bledsoe's oocytes, turned them over to CFHR's embryologist, assessed the quality of the embryos, or determined when to begin the freezing process. Dr. Sanfillipo further concluded that Oktay properly extracted a sufficient number of oocytes, and that his medical involvement in the matter ended on August 11, 2008, when the embryos were frozen.

Dr. Sanfillipo asserted that, based upon national data compiled by the Society for Assisted Reproductive Technology, the overall chance of success with IVF for women between 38 and 40 years of age is 11.1%, and 5.7% for women between the ages of 41 to 42 years, assuming that the woman is healthy and not a cancer patient. As he explained it, these results are "a reflection of the age of the egg in the ovary and intrinsic genetic activity not proceeding properly in comparison to a female younger" than the subjects of that study. Dr. Sanfillipo

averred that the 50-minute discussion that Oktay had with the plaintiffs was well within the standard of care. Dr. Sanfillipo went on to explain that

> "[t]he Letrozole Protocol, to which the plaintiff had consented, was appropriately initiated on July 30, 2008. This protocol---which is still in use today---reflects Dr. Oktay's research to provide patients with breast cancer a better chance of success, while trying to minimize the adverse effects intrinsic to the ovulation induction portion of the IVF cycle which automatically increases estrogen levels. The addition of letrozole is an effort to decrease adverse effects of the ovarian response to increased estrogens on the breast tissue."

Oktay's expert opined that Oktay appropriately monitored Bledsoe and oversaw her monitoring via bloodwork and ultrasound scans, as such monitoring allowed for adjustments to medication dosages as needed. The expert further concluded that the egg retrieval was timely performed on August 8, 2008 and that, given Bledsoe's age, the retrieval of 14 oocytes represented an outstanding response to the letrozole stimulation cycle. As he put it, such a response "also substantiates the fact that the procedure was performed properly and in accordance with good and accepted practice."

Dr. Sanfillipo further explained that

> "[a] physician who practices reproductive endocrinology develops the treatment plan, initiates ovarian stimulation, and collects the eggs. The retrieval of the eggs on August 8, 2008 marked the end of Dr. Oktay's treatment of plaintiff DANA BLEDSOE, and all further actions regarding the patient, including fertilization and cryopreservation, were performed by the defendant embryologists and not under Dr. Oktay's supervision."

As he described it, once the eggs are retrieved and turned over to the embryologists, "the embryologists are at the mercy of the genetics of the eggs. Although the eggs can appear satisfactory and be fertilized, this does not necessarily ensure a good result." He continued that the age of the egg affects function,

> "and there is an increased risk of miscarriage secondary to what may well be abnormal genetic composition. More succinctly, a patient can produce fifteen (15) eggs that can be developed into fifteen (15) embryos with no successful pregnancy while another patient can produce one egg that will be turned into one embryo that will result in a live birth; all of this is dependent on the age of the egg and its intrinsic genetics."

With respect to the plaintiffs' claim that they were not afforded an opportunity to proceed with a second IVF cycle due to assurances by Oktay, Dr. Sanfillipo asserted that,

> "[i]n purely practical terms, proceeding with a second cycle would have delayed the commencement of chemotherapy for a minimum of four (4) weeks and would not have guaranteed a liveborn. In my more than forty (40) years of experience, it is extremely rare for a patient to undergo a second cycle of fertility preservation due to the time constraints imposed for initiation of chemotherapy so as to allow the best chance of successful cancer therapy. In fact, many patients do not even have the option of one cycle due to the narrow window of opportunity to proceed with fertility preservation that oncologists allow."

He further concluded that it would have been mere speculation as to whether a second IVF cycle would have produced a different result, "as one would be dealing with the same patient, with the same age of the eggs, with the same genetic composition." Based on his review of the parties' deposition transcripts and CFHR's records, Dr. Sanfillipo noted that the plaintiffs knew that at least some of the embryos had not progressed well, based upon a telephone conversation with the defendant embryologist Zhong on the day of freezing, and that "this compromise was apparent even before the freezing process; a process that carries its own risks. Not all embryos survive the freeze-thaw process." He averred that even "the best approach" did not guarantee success, especially in light of the plaintiff's age, illness, and history of miscarriages.

Dr. Sanfillipo concluded that,

> "[a]s plaintiff's fertility physician, Dr. Oktay was treating the plaintiff for fertility preservation. He formulated an appropriate treatment plan, properly initiated and monitored ovarian stimulation, and successfully retrieved eggs. It was not his responsibility to review the evaluation and grading of the embryos prior to freezing, to monitor the cryopreservation, or to make certain that the embryos were properly stored."

He thus further concluded that Oktay did not deviate from good and accepted practice in any respect, and that nothing that he did nor did not do caused or contributed to the mistreatment, degradation, destruction, or loss of the plaintiffs' embryos.

In opposition to Oktay's motion, the plaintiffs relied on the same documentation as did Oktay, and also submitted the affirmation of an embryologist with a master's degree in biology.

He or she claims that, over a 30-year career in embryology, she or she has "personally performed thousands of IVF procedures in all aspects of the specialty. These range from human oocyte (egg) retrievals, fertilization, micromanipulation, cryopreservation and thawing of embryos, oocyte and embryo grading and assessment, and biopsy of embryos." Based on a review of the deposition transcripts and medical records, the embryologist noted that the defendant Jiangmin Li, a biologist with a Ph.D. in reproductive physiology, was the director of the laboratory at CFHR during 2008, and had trained Zhong on how to grade embryos with the system employed by CFHR, as well as on egg retrieval, fertilization, sperm preparation, intracytoplasmic sperm injection, cryopreservation, and the preparation of embryos for transport from CFHR to another storage facility, to the extent that Zhong could independently perform all embryology laboratory functions at CFHR.

As the plaintiffs' embryologist explained it,

> "CHR had an Embryo Grading System in effect in 2008 which Dr. Li wrote and Dr. Gleicher [CFHR's executive director] reviewed and signed off on. It was a two-page document that listed the grading criteria for Day 3 and Day 5 embryos. A combination of an older Veeck system plus a few others, there were 5 categories available to score D3 (cleavage stage) embryos, with 5 being the best quality and 1 the poorest. An ideal 8 cell [embryo] with no fragmentation and equal size blastomeres (cells) was a grade 5. All of Dana's embryos were grades 4 or 3, per the CHR cycle records. Grade 4 embryos ("good") were defined as 8 or more equal sized cells with <10% fragmentation, or that 8 cell could have unequal sized cells with no fragmentation. Grade 3 embryos ("fair") were defined as 6 or more equal sized cells with <25% fragmentation, or if cells were unequal sizes, <10% fragmentation.
>
> "Embryo grade, or morphology, helps to predict which embryos will survive a freeze-thaw process intact. Although it is not a guarantee, it is well-known in the field that highly fragmented embryos do not survive as well as those with fewer cellular fragments. Fragmentation is apoptosis - programmed cell death - and as such, the presence of more than 10% fragmentation in an embryo can mean that the cells are struggling. Four of Dana's 8 cells were grade 4: this indicates that they did not have significant fragmentation. One 8 cell and three 6 cells presumably had at least some fragmentation, though the grading is very vague here because it is not known if the cells were even or uneven sizes. Varying cell sizes should not affect freeze-thaw success unless the cell volumes are significantly different, some being roughly twice the size of others, as this may indicate unequal distribution of chromosomal material."

The expert continued that chromosomal material needs to be meticulously replicated and distributed to each new cell in the embryo during development. He or she asserted that large cells in an embryo may contain much more chromosomal material than the others, an indication of poor viability that would cause them not to survive the freezing and thawing process well, and may render the embryo atretic, that is, dead, at the post-thaw assessment. The expert averred that "[t]he standard of care in embryology requires detailed assessment of each embryo, to try to predict how well they will survive and implant in the patient later in order to counsel the patient about her future chances of success."

The expert concluded that a three-cell embryo, similar to one of the plaintiffs' embryos that was ultimately thawed, should not have been graded as a level-three embryo because an embryo would need to have been at least six cells to be given that grade. The expert opined that the mischaracterization of that one embryo, and the failure to inform the plaintiffs of the true nature of it, constituted a departure from good and accepted practice in embryology. Referring to CFHR's manual, the expert asserted that CFHR required that a final assessment of embryo quality be performed prior to freezing, and that all straws be labeled with the patient's full name, social security number, date, type of freeze, and cycle-day frozen, but did not require a delineation of which were stored in which straws, a practice described as "unusual in the field." The expert asserted CFHR departed from good and accepted embryologic practice by placing two embryos together in three separate straws, since the fertility clinic team performing the thawing operation would not want to thaw only those embryos for a transfer and the team would not be aware that they were thawing any of those two embryos together, as there was no documentation indicating which embryos they would find in the straws.

The plaintiffs' retained embryologist noted that CFHR's own criteria for freezing embryos indicated that freezing was appropriate where there was less than 25% fragmentation in the embryo, but that "[i]n unusual situations (deemed acceptable by the Embryology Director) embryos with 40% fragmentation, or embryos that are slightly irregular may be frozen. In these

situations, the patient should be counseled that the embryos cryopreserved may not survive the thaw." The expert faulted CFHR for failing to document that Oktay or any other employee engaged in such counseling.

The expert repeated Dr. Gleicher's testimony that, once an embryo is cryopreserved, its quality cannot change, assuming that the embryo is cryopreserved properly and there is no storage tank malfunction, Li's testimony that an embryo should not deteriorate if properly cryopreserved, and Zhong's testimony that once an embryo is frozen it is impossible for the embryo to disintegrate. Moreover, as the expert interpreted the parties' testimony, Bledsoe's oncologist, Dr. Reichman, told her that she could delay the start of her chemotherapy if she needed to undergo a second round of egg retrieval, but that Oktay told Dr. Reichman that there was no point in undertaking another egg retrieval and, therefore, Bledsoe could commence chemotherapy. The expert further asserted that Bledsoe was not informed that Oktay would not be involved in the fertilization process, and was not informed of fertilization rates or rates of embryonic survival.

The plaintiff's expert explained that a commercial freezing kit, like the LifeGlobal one used by CFHR, provided a way to expose the embryos to increasing concentrations of cryoprotectant, which permeates the cells and replaces the water content. The expert described that the cryoprotectant should become a homogeneous "glass"-type substance at low temperatures, rather than a crystalline-type material. He or she asserted that "[s]loppy protocol adherence can cause the cryoprotectant to permeate incompletely, thus allowing the ice crystals to damage or kill the embryo." As the expert explained,

> "[o]nce the straws of embryos are frozen and plunged into liquid nitrogen storage, their cellular activity stops. No growth is possible; no change in grade can occur. Liquid nitrogen storage temperature is below 150C. Damage to the zona pellucida, the outer covering of a day 3 embryo, can potentially occur between -80 to -150C, and would be the first indication of poor handling, although this type of damage is not often seen. Intracellular ice formation, from poor handling of samples, can occur anywhere between -80 and -5C and this is the most dangerous to the embryo's future survival. Warming in ambient air

> occurs quickly and an embryologist can damage samples by carelessness or moving too slowly."

The expert opined that the embryos "were likely compromised," even though they survived the thaw intact, because an embryologist would expect them either to grow faster, or for the cells to compact into a morula stage, which is often seen in four-day-old embryos such as the plaintiffs', thus reflecting appropriate embryo development.

As relevant here, the plaintiff's expert concluded that Oktay, departed from good and accepted "embryological practice" in his care and treatment of the plaintiffs. Specifically, the expert concluded that the Oktay did not "extensively counsel[ ]" the plaintiffs about "the statistics and success rates for patients in their situation." As the expert explained it, Bledsoe's embryos

> "were frozen using slow freezing, a technique that typically results in approximately 80% of the embryos surviving the freeze and thaw process. An important element of cryopreservation is the technical skill of the embryologists. Embryologists can affect embryo survival rates with careless or poor adherence to protocols. Survival can also be affected by embryo quality. It is well known in fertility medicine and embryology that the higher quality of the embryo, the more likely it is to survive cryopreservation and thawing. In plaintiffs' case, the embryos were only fair to good, but their survival rate upon thawing should have been near the usual 80% as far as resulting in embryos sufficient to be transferred post-thaw. Here, less than half of the cryopreserved embryos were sufficient for transfer after thaw, and two were not even found in the straws, an outcome well below the usual result of a slow freeze and thaw."

After noting the poor quality of the embryos that were thawed, the expert conceded that is was "unreasonable to think that these embryos had more than a minimal chance of success." The expert thus opined, "to a reasonable degree of embryological and medical certainty," that Oktay and his co-defendants "deviated from good and accepted embryology practice" in their "evaluation, grading, and cryopreservation of plaintiffs' embryos in August 2008, resulting in five of their nine embryos either not being present in the straw upon thawing, degenerated to such a degree their cell number was unable to be determined or being of insufficient quality for transfer." In this regard, the expert asserted that Oktay and his codefendants failed to

recognize that the nine embryos that were selected for cryopreservation may not have been of a quality sufficient to survive the thawing process and thereafter be implanted into the plaintiffs' gestational carrier, and that they further departed from good care by failing properly to convey this information to the plaintiffs.

The expert further opined, "to a reasonable degree of embryologic and medical certainty," that these departures were a substantial factor contributing to the plaintiffs' inability "to transfer five of the embryos to a gestational carrier, and being deprived of the chance of a pregnancy and live birth of a child from these embryos." As the expert explained it,

> "[t]he fact that two of the nine embryos were not present in the straws on December 5, 2010 is a clear indication that these embryos were damaged during freezing or were disintegrated by ice crystals which formed due to improper handling of the specimens."

The expert again explained that, since once an embryo is cryopreserved, it does not change or deteriorate if properly cryopreserved and stored, the absence of an embryo upon thawing "can mean that the embryologist failed to load the embryo," but that the "more likely scenario is that the embryos were damaged in the freezing process resulting in dead cells."

> "Possible reasons for this damage . . . include improper handling, failing to adhere to the cryopreservation protocol, improper timing of the straw seeding as described in CHR's cryopreservation protocol or improper handling of the straws during the plunging of the straws post-freeze. These issues can result in an embryo being pulled apart, stuck to the straw wall or stuck to an air bubble and damaging the embryo. It is my opinion to a reasonable degree of medical and embryological certainty that in this case the two 'missing' embryos that were not visualized upon thawing of straws #1 and #2 on December 5, 2010 resulted directly from the negligence of Ms. Zhong during the initial freeze process on August 11, 2008."

The expert also concluded that the additional two embryos that Yale was able to identify following thawing, but could not assess and later discarded, "were also compromised in the freezing process at CHR due to improper handling or failure to adhere to the freeze protocols." The expert averred that this conclusion was supported by the fact that CFHR's paperwork indicated that the lost or degenerated embryos were graded as fair to good, and that embryos of

this quality, "although not excellent as described to the plaintiffs by Dr. Oktay, should not degenerate to the extent that the number of cells is unable to be determined after thawing, which indicates the compromise of the embryos during the freeze."

The expert also opined that it was a departure from good and accepted medical care to deprive Bledsoe of the opportunity to undergo a second round of oocyte retrieval and IVF procedures, and that deprived her of the opportunity to extract additional eggs that might have been fertilized and transferred to the gestational carrier.

In reply, Oktay submitted the affirmation of his attorney, as well as a further affirmation from Dr. Sanfillipo. Counsel, among other things, stressed that the claims asserted against Oktay sounded in medical malpractice and not in garden-variety common-law negligence, that he was an employee and not a director of CFHR, and that the plaintiffs' expert, who was not a physician, was not qualified to opine on the standards of care applicable to a physician such as Oktay. Counsel further challenged the plaintiffs' assertion that Dr. Reichman, Bledsoe's oncologist, would have permitted Bledsoe to undergo a second egg-retrieval cycle, characterizing the claim as unsupported and contradicted by the deposition testimony and medical proof. In this regard, counsel pointed to communications between Dr. Reichman and Bledsoe, as well as Dr. Reichman and Bledsoe's insurer, indicating that the commencement of chemotherapy was urgent, and noted that the plaintiffs' expert's conclusions were based solely on hearsay statements by Bledsoe.

Dr. Sanfillipo asserted that

> "When plaintiff's expert says that he/she has 'personally performed thousands of IVF procedures [ranging] from human oocyte (egg) retrievals . . . ' he/she may be parsing words. . . . [This is analogous to a flight attendant saying I have flown planes.] While an embryologist may be present at an adjacent or nearby embryology laboratory that handles the eggs collected by a subspecialist M.D. by a retrieval and receive the eggs from the physician, he/she cannot and does not perform an egg retrieval. An egg retrieval is a surgical procedure wherein a licensed practitioner advances a needle typically transvaginally, after the patient is under sedation under the auspices of a Nurse Anesthetist or Anesthesiologist. Under ultrasound guidance, the vaginal probe with a needle is placed into each ovary to aspirate follicles that contain eggs. As such, not only can an

> embryologist not perform an egg retrieval but he/she is also not an expert in such a procedure."

Dr. Sanfillipo further opined that "fertility preservation is an expertise area within the subspecialty of Reproductive Endocrinology & Infertility. Only a physician with such credentials, not an embryologist, can make an assessment as to whether a patient is an appropriate candidate for fertility preservation." In addition, he asserted that

> "only a licensed physician, typically a subspecialist in Reproductive Endocrinology & Infertility, not an embryologist, can counsel, examine, and determine the eligibility of a patient for fertility preservation, design and initiate an ovarian stimulation protocol, initiate ovarian stimulation, monitor a patient's progress, adjust ovulation induction medications, i.e., part of the IVF cycle, as necessary, and determine the appropriate time to proceed with egg Retrieval."

Hence, Dr. Sanfillipo concluded that the plaintiffs' expert did not possess the necessary education, training, and experience to offer opinions regarding the standard of care for a physician specializing in reproductive endocrinology and infertility.

Finally, Dr. Sanfillipo noted that Dr. Reichman's records, beginning with her initial consultation with Bledsoe on July 8, 2008, demonstrated a clear recognition of the time constraints for the commencement of chemotherapy, and "unequivocally establish that the possibility of a second cycle was never even remotely entertained."

A. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether

summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.; Medina v Fischer Mills Condo Assn*., 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.,* 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense (*see Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

B. STAUTE OF LIMITATIONS

By order dated January 25, 2018, the court (Madden, J.) denied Oktay's motion pursuant to CPLR 3211(a)(5) to dismiss the complaint against him as time-barred on the ground that a motion pursuant to CPLR 3211(a) was improper since he had already served an answer. The denial, however, was without prejudice to the submission of a motion for summary judgment on the same ground after the completion of discovery, including depositions. Inasmuch as discovery is now complete, this court considers the merits of Oktay's contention, set forth in his summary judgment motion, that the action is time-barred as to him, and concludes that the action is indeed time-barred as to Oktay.

In connection with a motion for summary judgment dismissing a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a question of fact as to "'whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period'" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

"Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'" (*Scott v Uljanov*, 74 NY2d 673, 674, 675 [1989], quoting *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence" (*Mendelson v Clarkstown Med. Assoc*., 271 AD2d 584, 584, [2d Dept 2000]; *see Bleiler v Bodnar*, 65 NY2d at 72; *Morales v Carcione*, 48 AD3d 648, 649 [2d Dept 2008]; *Levinson v Health S. Manhattan*, 17 AD3d 247, 247 [1st Dept 2005]). The claims against Oktay involve medical treatment, and all of his conduct bore a substantial relationship to the rendition of medical treatment. Hence, the two-year-and-six-month limitations period of CPLR 214-a, applicable to medical malpractice actions against private health-care providers, applies to the claims asserted here against Oktay, and the general three-year limitations period of CPLR 214(5) applicable to other personal injury claims is inapplicable.

The applicable two-year-and-six-month period is measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214-a).

Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is two years and six months from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C.*, 112 AD3d 499 [1st Dept 2013]).

The "continuous treatment" provision of CPLR 214-a posits that the limitations period "does not begin to run until the end of the course of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously and is *related to the same original condition or complaint*" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted] [emphasis added]; *see Massie v Crawford*, 78 NY2d 516, 519 [1991]; *McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *Jajoute v New York City Health & Hosps. Corp.*, 242 AD2d 674, 676 [1st Dept 1997]). This rule applies both to claims of alleged departures from accepted practice and lack of informed consent (*see Murray v Charap*, 150 AD3d 752, 753-754 [2d Dept 2017]).

In analyzing whether to apply the continuous treatment doctrine, the Appellate Division, First Department, has articulated a nuanced rule that takes account of a "plaintiff's belief" that he or she "was under the active treatment of defendant at all times, so long as" the treatments did not "result in an appreciable improvement" in his or her condition (*Devadas v Niksarli*, 120 AD3d 1000, 1006 [1st Dept 2014]). Even where a "plaintiff pursued no treatment for over 30 months after" an initial, allegedly negligent surgical treatment (*id*. at 1005),

> "[i]n determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he [or she] sought such treatment (*see Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his '[doctor] for life,' and that the efficacy of the [treatment] was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed"

(*id*.at 1006). Where such a situation obtains,

> "[c]ases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable . . . , to the extent they reiterate that 'continuous treatment exists "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past"' (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899)"

(*id*. at 1007).

Oktay established, prima facie, that he last directly treated the patient on August 8, 2008, that he last directed any CFHR employee with respect to any aspect of the plaintiffs' fertility issues on August 11, 2008, when he ordered Zhong to freeze the embryos, and that he had no further obligations or responsibilities in connection with the plaintiffs thereafter, as those obligations and responsibilities devolved upon others at CFHR. The limitations period applicable to the claim against Oktay thus lapsed after February 11, 2011, and this action, commenced by the plaintiffs on June 24, 2011, was time-barred as to him, unless the continuous treatment toll applied to Oktay.

Oktay made a showing that the plaintiffs may not impute the continuous treatment rule to toll the statute of limitations against him, inasmuch they had no continuing relationship with him subsequent to August 11, 2008. In opposition to Oktay's showing, the plaintiffs failed to raise a triable issue of fact as to whether the continuous treatment doctrine tolled the limitations period up to and including June 24, 2011. A single telephone call between Oktay and Dr. Arici in November 2010, in which Oktay simply described CFHR's grading system, did not constitute examination, advice, or treatment (see *Pierre-Louis v Ching-Yuan Hwa*, 182 AD2d 55, 58 [2d Dept 1992]; *Swartz v Karlan*, 107 AD2d 801, 802-803 [2d Dept 1985] [a single telephone call by a prior treating physician to a subsequent treating physician to verify the proper dosage of medication that had previously been prescribed to patient does not constitute continuous treatment]). Nor was the continuing supervision of the cryopreserved embryos by Oktay's co-employees at CFHR sufficient, in and of itself, to invoke the toll (*see Pierre-Louis v Ching-Yuan*

Hwa, 182 AD2d at 59). Rather, after August 11, 2008, the evaluation and maintenance of the embryos became the responsibility of other health-care providers at CFHR, whose negligence, if any, cannot be imputed to Oktay (*see Kennedy v Decker*, 237 AD2d 576, 577 [2d Dept 1997]).

In light of the foregoing, Oktay must be awarded summary judgment dismissing the complaint insofar as asserted against him on the ground that the action was time-barred as to him.

C. MEDICAL MALPRACTICE BASED ON DEPARTURE FROM ACCEPTED PRACTICE

Oktay also is entitled to summary judgment dismissing the complaint against him on the grounds that he did not depart from good and accepted practice, and that nothing that he did or did not do proximately caused the degradation or loss of the embryos or the lack of success in implanting them into the gestational carrier. He made the necessary prima facie showing in this regard and, in opposition, the plaintiffs failed to raise a triable issue of fact.

"To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 522 [1st Dept 2004]). Where a physician fails properly to diagnose or improperly diagnoses a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, thus proximately causing injury, he or she will be deemed to have departed from good and accepted medical practice (*see Zabary v North Shore Hosp. in Plainview*, 190 AD3d 790, 795 [2d Dept 2021]; *see Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the

community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Medical Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v Centereach Mgt. Group, Inc.*, 94 AD3d 955 [2d Dept 2012]; Sharp v Weber, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v Noble*, 73 AD3d at 206; *Joyner-Pack v. Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital,* 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id.*, quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a

departure from accepted medical practice and opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp*., 99 NY2d 542, 544 [2002]; *see Frye v Montefiore Med. Ctr*., 70 AD3d at 24).

"'Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause'" (*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 551 [2d Dept 2018], quoting *Burns v Goyal*, 145 AD3d 952, 954 [2d Dept 2016]). Thus, where a moving defendant in a medical malpractice action makes a prima facie showing that he or she did not depart from good and accepted practice, or that the treatment rendered to the plaintiff did not cause or contribute to the plaintiff's injuries, the plaintiff, to defeat summary judgment, must submit an expert affirmation or affidavit in opposition; a plaintiff's failure to submit such an expert affirmation or affidavit under such circumstances requires the court to award summary judgment to the moving defendant (*see Benedetto v Tannenbaum*, 186 AD3d 1596, 1598 [2d Dept 2020]; *Bethune v Monhian*, 168 AD3d 902, 903 [2d Dept 2019]; *Koster v*

Davenport, 142 AD3d 966, 969 [2d Dept 2016]; *Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 497 [2d Dept 2016]; *Roques v Noble*, 73 AD3d at 207; *Bailey v Owens*, 17 AD3d 222, 223 [1st Dept 2005]; *cf. Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004] [unsworn affidavit of unnamed expert that was not affirmed under the penalties for perjury is insufficient to raise triable issue of fact as to defendants' alleged malpractice]).

Oktay established, with Dr. Sanfillipo's affirmation, the plaintiff's medical records, and the parties' deposition testimony, his prima facie entitlement to judgment as a matter of law dismissing the medical malpractice cause of action insofar as asserted against him. Dr. Sanfillipo established that he was qualified as an obstetrician/gynecologist with a board-certified subspecialty in reproductive endocrinology, who has practiced in the fields of reproductive endocrinology and infertility for several decades. His affirmation established that Oktay did not depart from accepted practice in these fields of medicine in connection with the manner in which he retrieved Bledsoe's eggs, handed them off to Zhong, directed Zhong to place them in straws and freeze them, and graded and characterized them according to standards developed at CFHR. In addition, Dr. Sanfillipo opined that those standards, including the determination to freeze embryos at day three after fertilization, were within the accepted bounds of medical practice. Moreover, Dr. Sanfillipo established that advising the patient to undergo only one egg-retrieval session was within the standard of care and that, in any event, only Bledsoe's oncologist was qualified to make the ultimate determination as to whether additional sessions would interfere with the timely administration of chemotherapy.

To oppose the motion, the plaintiffs have not submitted an expert affirmation or affidavit from a retained *medical* expert in obstetrics, gynecology, or reproductive endocrinology. Rather, they submitted an affirmation from a non-physician embryologist, who is not qualified to render an opinion as to the standards of care appliable to a physician who is tasked with extracting eggs and thereupon giving them to an embryologist, with limited instructions, for

further processing, and providing medical advice as to how many egg-retrieval sessions were appropriate for a particular patient.

The determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*see Guzman v 4030 Bronx Blvd. Assoc., LLC*, 54 AD3d 42, 49 [1st Dept 2008]).

The courts of this State repeatedly have rejected the concept that only a specialist practicing in a defendant's particular specialty is competent to testify that another specialist departed from accepted practice in the specialty (*see Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247,1248 [4th Dept 2008]; *Julien v Physician's Hosp*., 231 AD2d 678, 680 [2d Dept 1996]; *Matter of Enu v Sobol*, 171 AD2d 302, 304 [3d Dept 1991]; *Joswick v Lenox Hill Hosp*., 161 AD2d 352, 355 [1st Dept 1990]). A physician who is put forward by a party as an expert qualified to oppose a summary judgment motion must assert that he or she possesses the necessary knowledge and training in the relevant specialty, or explain how he or she came to it, and also must articulate the standard of care that allegedly was violated (*see Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]).

> "To qualify as an expert, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, if a physician possesses the requisite knowledge and expertise to make a determination on the issue presented, he need not be a specialist in the field. The question of whether a physician may testify regarding the standard of accepted medical practice outside the scope of his specialty can be a troublesome one, but appellate courts have rejected claims of error directed at a physician's qualifications to offer an opinion outside the scope of his specialty when the witness's specialty is closely related to the specialty at issue"

(*Matter of Enu v Sobol*, 171 AD2d at 304 [citations omitted]). Thus, although

> "[t]he nonconclusory opinion of a qualified expert based on competent evidence that a defendant departed from accepted medical practice and that that departure was a proximate cause of plaintiff's injury precludes a grant of summary judgment in favor of the defendants (*see Diaz v New York Downtown Hosp.*, 99

> NY2d 542; *Cregan v Sachs*, 65 AD3d 101, 108, 879 NYS2d 440 [1st Dept 2009]), . . . *the affidavit must be by a qualified expert who 'profess[es] personal knowledge of the standard of care in the field of . . . medicine [at issue], whether acquired through his practice or studies or in some other way'* (*Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015] [pathologist not qualified to render opinion as to whether defendant deviated from the standard of care in the field of emergency medicine]; *see also Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 20 NYS3d 33 [1st Dept 2015] [osteopath not qualified to render opinion on treatment of a geriatric patient with diabetes and other conditions]; *Udoye v Westchester-Bronx OB/GYN, P.C.,* 126 AD3d 653, 7 NYS3d 59 [1st Dept 2015] [pathologist not qualified to render an opinion as to the standard of care in obstetrics or cardiology]; *Mustello v Berg,* 44 AD3d 1018, 845 NYS2d 86 [2d Dept 2007] [general surgeon not qualified to render opinion as to gastroenterological treatment]).

(*Bartolacci-Meir v Sassoon*, 149 AD3d at 572-573 [emphasis added]).

Nonetheless, a non-physician embryologist, who, despite assertions that he or she had been involved in thousands of IVF procedures, is not qualified to make the medical decisions that Oktay made here, or undertake the direct medical procedures that Oktay performed in connection with Bledsoe. He is thus not qualified to render a medical opinion as to whether Oktay departed from good and accepted medical practice, or adhered to standards applicable to physicians (*see LaMarque v North Shore Univ. Hosp*., 227 AD2d 594, 594-595 [2d Dept 1996] [even though a non-physician psychologist and a psychiatrist may have familiarity with similar mental-health conditions and treatments, the psychologist was not qualified "to render an expert opinion as to the appropriate standards of medical and psychiatric care, and what, if any, departures from that standard of care were committed by the defendants"]; *see also Geffner v North Shore Univ. Hosp*., 57 AD3d 839, 842 [2d Dept 2008] [suggesting that pharmacist is not qualified to render medical opinion as to the appropriate standard of care for physicians in the administration and use of drugs]; *Elliot v Long Is. Home, Ltd*., 12 AD3d 481, 482 [2d Dept 2004] [registered nurse is not qualified to render expert opinion as to whether physician departed from accepted standard of care]; *Hoffman v Pelletier*, 6 AD3d 889, 890-891 [3d Dept 2004] [licensed practical nurse and dentist/psychologist]; *Mills v Moriarty*, 302 AD2d 436, 436 [2d Dept 2003] [nurse practitioner]; *Jordan v Glens Falls Hosp*., 261 AD2d 666-667 [3d Dept 1999]

[pharmacologist]; *Montant v Gluck*, 2018 NY Slip Op 30820[U], *4, 2018 NY Misc LEXIS 1617, *7-8 [Sup Ct, Suffolk County, Apr. 23, 2018] [physician's assistant]).

Moreover, "to defeat a motion for summary judgment, the party opposing the motion must 'assemble and lay bare [his] proof to demonstrate that there are genuine triable issues and reliance upon conclusory assertions, conjecture, mere suspicion or surmise will not suffice for this purpose'" (*Bank of N.Y. Mellon v Slavin*, 156 AD3d 1073, 1076 [3d Dept 2017], quoting *Spielman v Acme Natl. Sales Co. [Del.]*, 159 AD2d 918, 919 [3d Dept 1990] [citation omitted]; *see Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014]). Even were the court to consider the plaintiffs' expert affirmation in connection with Oktay's motion, the expert never specified with particularity just what Oktay did or did not do with respect to the egg retrieval procedure that constituted negligence. He or she did not refute Oktay's showing that, once the oocytes were handed off to Zheng, Oktay had no further involvement in or responsibilities related to freezing and storage, including the determination as to how many embryos should be stored in each straw. His or her opinions that Oktay should have waited until the fifth day after fertilization for the embryos to be frozen, and that Oktay should have encouraged or approved a second round of egg retrieval, involved medical decisions that he or she is not qualified to assess.

Crucially, the expert's opinion failed to raise a triable issue of fact as to whether improper quality grading, faulty documentation, or labeling caused or contributed to the degeneration of several embryos and the failure of the non-degenerated embryos to implant (*see Hoffman v Pelletier*, 6 AD3d at 890-891), as those outcomes would have occurred regardless of the grade given to each embryo or how the test tubes or straws were labelled or documented. Assuming that the embryos should have been graded or characterized differently, or that they should have been documented and labeled in the manner preferred by the expert, would not have affected the actual outcome, but only the plaintiffs' expectations.

The plaintiffs' expert provides no evidence tending to show a proximate connection between any of Oktay's alleged departures from accepted medical practice and the degradation, damage, or ineffectiveness of the plaintiffs' embryos. Rather, the expert seems to suggest that the absence of an embryo from one straw, the degradation of other embryos, and the failure of the higher quality embryos to generate a pregnancy---a bad outcome---established that there must have been a departure from accepted standards of care. Contrary to the experts suggestion, "'a bad result does not, ipso facto, support a claim for medical malpractice'" (*Nabozny v Cappalletti*, 267 AD2d 623, 628 [3d Dept 1999], quoting *Schoch v Dougherty*, 122 AD2d 467, 468 [3d Dept 1986]; *see Saliaris v D'Emilia*, 143 AD2d 996, 996-997 [2d Dept 1988]; *Henry v Bronx Lebanon Med. Ctr*., 53 AD2d 476, 480 [1st Dept 1976]).

The only exception to that general rule is where a plaintiff may be permitted to rely on the doctrine of res ipsa loquitur, which the court concludes is not warranted here. Where a plaintiff cannot directly establish that a physician's departure from good and accepted practice caused an injury, the theory of res ipsa loquitur may be applied to occurrences "[w]here the actual or specific cause of an accident is unknown" (*Kambat v St. Francis Hosp*., 89 NY2d 489, 494 [1997]). Under such circumstances, "a jury may . . . infer negligence merely from the happening of an event and the defendant's relation to it" (*id*.; *see States v Lourdes Hosp*., 100 NY2d 208, 211-212 [2003]; Restatement [Second] of Torts § 328D). To establish a prima facie case of negligence in support of a res ipsa loquitur charge, plaintiff must establish three elements:

> "[1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
>
> "[2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> "[3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff"

(*Kambat v St. Francis Hosp.,* 89 NY2d at 494; *see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Ebanks v New York City Tr. Auth*., 70 NY2d 621, 623 [1987]; Prosser and Keeton, Torts § 39 at 244 [5th ed]). Res ipsa loquitur, a doctrine of ancient origin (*see Byrne v Boadle*, 2 H & C 722, 159 Eng Rep 299 [1863]), derives from the understanding that some events ordinarily do not occur in the absence of negligence (*see id.; see also Dermatossian v New York City Tr. Auth*., 67 NY2d 219, 226 [1986]).

Once a plaintiff satisfies the burden of proof with respect to these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence (*see States v Lourdes Hosp.*, 100 NY2d at 211-212; *Kambat v St. Francis Hosp.,* 89 NY2d at 495). Thus, for example, where "a foreign object is left in the body of the patient, or the patient, while anesthetized, experiences an unexplained injury in an area which is remote from the treatment site" (*McCarthy v Northern Westchester Hosp*., 139 AD3d 825, 827 [2d Dept 2016] [citation omitted]), the invocation of the doctrine of res ipsa loquitur may be warranted (*see id.; see also Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2027 [3d Dept 2020]*; Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2d Dept 2015]; *DiGiacomo v Cabrini Med. Ctr*., 21 AD3d 1052, 1054 [2d Dept 2005]; *Escobar v Allen*, 5 AD3d 242, 243 [1st Dept 2004]; *Leone v United Health Servs*., 282 AD2d 860, 860-861 [3d Dept 2001]; *Hill v Highland Hospital*, 142 AD2d 955, 956 [4th Dept 1988]).

Here, however, Oktay provided ample proof that negative outcomes in IVF procedures not only occur in the absence of negligence, but that negative outcomes are more likely than positive outcomes under all circumstances, regardless of whether it was a three-cell, six-cell, eight-cell, or nine-cell embryo that was frozen and later thawed and implanted, and regardless of whether freezing was effectuated on day three or day five after fertilization. Moreover, the only suggestions in the plaintiffs' expert affirmation that negligence is the only explanation for the degenerated or lost embryos were second-degree hearsay statements by Dr. Aciri and the Yale embryologist that they previously had never seen embryos in the same condition as the

plaintiffs' embryos, and had never received an empty straw from a fertility center before, statements that, even if submitted in affidavit form by the declarants, would be insufficient to raise a triable issue of fact as to Oktay's negligence. In addition, the expert sets forth contradictory potential causes for the bad outcome in this case, first asserting that the embryos were damaged during freezing or were disintegrated by ice crystals that formed due to improper handling and freezing of the specimens or, conversely, that they were of inferior quality immediately upon fertilization and that they were unlikely to yield a positive outcome ab initio. Either of those explanations, however, constitutes mere surmise.

The expert's conclusion that Oktay did not fully apprise the plaintiffs of the likely outcome or misled them in some respect is belied by the consent form that they executed (*see* discussion below). The expert's contention that Oktay guaranteed a positive outcome, although disputed by the parties, raises the issue of whether Oktay breached a contract or guaranty, a cause of action not pleaded here (*see B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 81 [1st Dept 2015] [while breach of contract cause of action against physician who fails to render appropriate care usually is subsumed in a medical malpractice cause of action, breach of contract claim may be stated where physician "expressed a specific promise to accomplish some definite result" and failed to achieve it]; *see also Leighton v Lowenberg*, 103 AD3d 530, 531 [1st Dept 2013]; *Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005]).

Since Oktay established his prima facie entitlement to judgment as a matter of law in connection with the claim that he departed from good and accepted practice, and the plaintiffs failed to raise a triable issue of fact in opposition thereto with admissible medical evidence, Oktay must be awarded summary judgment dismissing the complaint on that ground as well.

D. LACK OF INFORMED CONSENT

The elements of a cause of action for lack of informed consent are

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable

> medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless, a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where, as here, a patient signs a detailed consent form, and there is also evidence that the necessity and benefits of the procedure, along with known risks and dangers, were discussed prior to the procedure (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

Oktay established, prima facie, that he provided the plaintiffs with information concerning foreseeable risks and benefits of the IVF procedure and chemotherapy protocol, as well as the likely negative outcome for pregnancy and live birth. In opposition, the plaintiffs failed to raise a triable issue of fact. Consequently, Oktay must be awarded summary judgment dismissing that cause of action insofar as asserted against him.

VI. CONCLUSION

The plaintiffs' remaining contentions are without merit.

In light of the foregoing, it is

ORDERED that the motion of the defendant Kutluk Han Oktay, M.D., is granted, the motion is deemed timely served and filed, without the need for deeming it to be timely nunc pro tunc, and Kutluk Han Oktay, M.D., is awarded summary judgment dismissing the complaint insofar as asserted against him; and it is further,

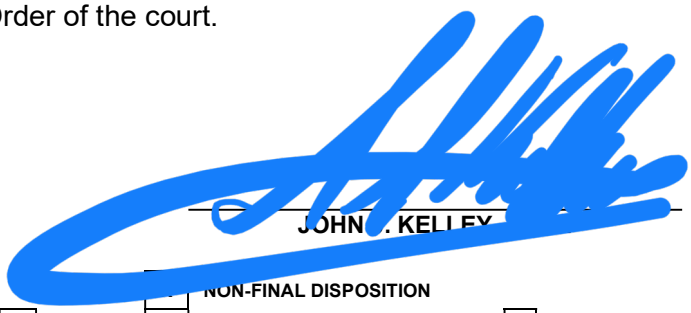
ORDERED that, on the court's own motion, the action is severed as against the defendant Kutluk Han Oktay, M.D.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Kutluk Han Oktay, M.D.; and it is further,

ORDERED that, on the court's own motion, the Note of Issue filed by the plaintiffs on March 14, 2019, and vacated pursuant to the Order dated January 9, 2020, be and hereby is deemed to have been re-filed, nunc pro tunc, as of December 2, 2020; and it is further,

ORDERED that, within 15 days of the entry of this order, the plaintiffs shall serve a copy of this order with notice of entry upon the Trial Support Office, 60 Centre Street, Room 148, New York, New York 10007, along with a copy of the Note of Issue initially filed on March 14, 2019, and shall file a form EF-22 with the County Clerk setting forth the notice pursuant to CPLR 8019(c), and the Trial Support Office shall amend its records, including the trial calendar, to reflect that the Note of Issue is deemed to have been filed on December 2, 2020.

This constitutes the Decision and Order of the court.



11/10/2022
DATE

JOHN [illegible]. KELLEY

CHECK ONE:		CASE DISPOSED				NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE